IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES FOR USE OF

VIKING DISPOSAL CORPORATION[1],

OPINION AND ORDER

Plaintiff,

06-C-0753-C

v.

WESTERN SURETY COMPANY,

Defendant.

- -

This is a civil action to recover the balance due under a subcontract related to a government construction project. Plaintiff Viking Disposal Corporation is a subcontractor that brought suit under the Miller Act, 40 U.S.C. § 3133 against Western Surety Company, which was responsible for the payment bond provided to the United States government by L.S. Black Constructors, the general contractor. Plaintiff brings this action on behalf of the

[1]In the parties' briefs, plaintiff was named as Viking Disposal Corporation on Behalf of the United States of America. To comply with the Miller Act, I have revised the caption slightly.

United States of America as required by 40 U.S.C. § 3133(b)(3). Jurisdiction is present. 28 U.S.C. §1331.

Now before the court is defendant's motion for summary judgment. Under the Miller Act, 40 U.S.C. § 3133(b)(2), a sub-subcontractor that has not received payment from a subcontractor for work performed during the course of a government project may bring a civil action on the payment bond provided by the general contractor. However, if the sub-subcontractor has no direct contractual relationship with the general contractor, the sub-subcontractor must, within 90 days of completing its work, give the general contractor written notice of its intention to make a claim against the payment bond. In this case, defendant is entitled to summary judgment because plaintiff did not satisfy the Miller Act notice requirements. 40 U.S.C. § 3133(b)(2).

One note about defendant's proposed findings of fact merits brief discussion. Many of defendant's proposed findings of fact were phrased in terms of what plaintiff alleged in its complaint or admitted to in its response to defendant's request for admissions. For example, defendant proposed as a fact that "In its responses, the Plaintiff admitted that it had a contractual relationship with New Generation, Inc. to furnish labor and materials for the project that is the subject of this lawsuit." The better way to state the proposed finding would be as follows: "Plaintiff had a contractual relationship with New Generation, Inc. to furnish labor and materials for the project that is the subject of this lawsuit." As support for

this proposed fact, defendant would cite plaintiff's admission. Because many of defendant's proposed facts were phrased in terms of what a party admitted or asserted, it was difficult to interpret some of the responses to these proposed findings. For example, in response to defendant's proposed finding of fact quoted above, plaintiff responded "No Dispute." The question is, to what is there no dispute: that plaintiff admitted something in its response, or that plaintiff had a contractual relationship with New Generation, Inc.? In the future, defendant's lawyer would be well advised to review this court's summary judgment procedures and Helpful Tips for Filing a Summary Judgment Motion in Cases Assigned to Judge Barbara B. Crabb, both of which were attached to the preliminary pretrial conference order entered in this case. Following these procedures would provide the court with greater clarity as to the material facts and save the court's time, as well as that of both parties.

However, it does not appear that the parties disagree about the material facts in this case; they disagree only about the legal conclusions to be drawn from those facts. I find the following facts to be material and undisputed.

FACTS

Sometime before May 12, 2006, L.S. Black Constructors, Inc. was hired as a general contractor by the United States government, to make improvements to the St. Croix National Scenic Riverway. As required by 40 U.S.C. § 3131(b), L.S. Black Constructors,

Inc. provided the United States government with a payment bond in order to protect all persons supplying labor and material in carrying out the contract work. Defendant Western Surety Company is the surety for that bond.

In order to fulfill the government contract, L.S. Black Constructors, Inc. subcontracted some of the work on the St. Croix project to New Generation, Inc. In turn, New Generation, Inc. subcontracted with plaintiff to furnish a portion of the labor and materials. Plaintiff began work on the project on May 12, 2006 and completed its work on June 8, 2006. The total invoice for plaintiff's labor and materials was $15,411.66; plaintiff has not received payment.

L.S. Black Constructors, Inc. received a copy of a letter dated August 15, 2006, addressed to plaintiff's lawyer from the United States Department of the Interior, which advised plaintiff of its rights under the Miller Act. Neither party establishes when this letter was sent to or received by L.S. Black Constructors, Inc. This letter stated:

> This letter acknowledges your letter of July 28, 2006 sent to Ron Erickson at the Riverway, containing Viking Disposal's written Notice of Intent to File a Lien Claim and alleging nonpayment for work performed under the above referenced contract dated September 20, 2004 under which L.S. Black Constructors, St. Paul, Minnesota, furnished a bond guaranteeing payment to persons supplying labor or material used in the prosecution of the work. The surety on the payment bond in this case is Western Surety Company, Sioux Falls, South Dakota.
>
> The contract does not authorize the Government to withhold payments from the contractor because of his failure to pay subcontractors or material

> suppliers for labor or material. Also, a lien claim may not be filed against federal property. By copy of this letter we are advising the prime contractor and his surety of your claim.
>
> Persons furnishing labor or material to the prime contractor for the work covered by the above-mentioned contract may file suit with the surety for payment on the payment bond after the expiration of 90 days from the date the labor or material was furnished, provided suit is filed within one year from such date. We are enclosing a circular containing the text of the Miller Act, which is the law requiring the contractor to furnish a payment bond, together with additional information concerning the protection afforded by the bond.
>
> Neither this letter nor any advice or assistance which you may receive from any National Park Service office regarding procedures for establishing a claim under the Miller Act should be construed as a determination that your claim is of a character properly cognizable under the act.

On September 13, 2006, more than 90 days after plaintiff completed its part of the project, plaintiff's lawyer sent L.S. Black Constructors, Inc. a letter discussing plaintiff's claim for the amount owed. This letter stated in its entirety:

> As you know this firm represents the Viking Disposal Corporation. Viking Disposal was a subcontractor for New Generation Equipment, Inc. for the work performed at the St. Croix National Scenic Riverway, Contract No. 1443C6020040906. Viking Disposal provided disposal services and dumpsters. Viking Disposal is still owed $15,411.66 for those services. This letter is merely sent to confirm the notice you received from the United States Department of Interior in a letter dated August 15, 2006. Please contact us to discuss this outstanding payment.

This letter was sent via certified mail and was received by defendant on September 14, 2006.

OPINION

Under the Miller Act, when a government contract is valued at more than $100,000, a contractor must furnish to the United States government a payment bond "for the protection of all persons supplying labor and material in carrying out the work provided for in the contract . . . ." 40 U.S.C. § 3131(b)(2). The Act allows those who have supplied labor or materials and have not been paid in full within ninety days of completing their work to bring a civil action on the payment bond for the amount owed. 40 U.S.C. § 3133(b). However, when a person wishes to bring such an action, but does not have a direct contractual relationship with the contractor who furnished the payment bond, the Miller Act requires the person to give written notice of the claim to the contractor "within 90 days from the date on which the person did or performed the last of the labor or supplied the last of the material for which the claim is made." 40 U.S.C. § 3133(b)(2).

Plaintiff contends that the copy of the August 15, 2006 letter from the United States Department of the Interior provided L.S. Black Constructors, Inc., the general contractor, with adequate notice of plaintiff's claim under the Miller Act. Defendant denies that the letter gave adequate notice under the terms of the Act. In addition, the letter was not sent by *plaintiff* to L.S. Black Constructors, Inc. and it states explicitly that it should not "be construed as a determination that [plaintiff's] claim is of a character properly cognizable under the act." The parties' dispute boils down to a question of what constitutes proper notice under the Miller Act. To answer that question I turn first to the text of the statute.

When interpreting statutes, courts "give words their plain meaning unless doing so would frustrate the overall purpose of the statutory scheme, lead to absurd results, or contravene clearly expressed legislative intent." United States v. Vallery, 437 F.3d 616, 630 (7th Cir. 2006). For written notice to be adequate under the Miller Act "the action must state with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed." 40 U.S.C. § 3133(b)(2). Additionally, the statute states specifically how notice must be served:

> The notice shall be served — A) by any means that provides written, third-party verification of delivery to the contractor at any place the contractor maintains an office or conducts business or at the contractor's residence; or B) in any manner in which the United States marshal of the district in which the public improvement is situated by law may serve summons. Id.

Plaintiff did not meet these requirements. The only written correspondence between plaintiff and L.S. Black Constructors, Inc. was the letter received by the general contractor on September 14, 2006, which purported to "confirm" the notice received through the copy of the August 15, 2006 letter sent by the Department of the Interior to plaintiff. Although the September 14, 2006 letter meets most of the technical requirements for proper notice under the Miller Act, it was not received within the 90-day window as required and therefore was untimely.

In response, plaintiff asserts that the September 14, 2006 letter was sent only to "confirm" the earlier notice that had been given to L.S. Black Constructors, Inc. Plaintiff

argues that the August 15, 2006 letter it received from the Department of the Interior, a copy of which was sent to L.S. Black Constructors, Inc., provided the actual notice of its intention to file a claim against the general contractor. This argument fails because the Department of the Interior letter does not meet the notice requirements as set out in the Miller Act.

First, the Department of the Interior letter does not state the amount that plaintiff claimed to be owed. Although the department suggested that plaintiff believed it was owed money for its work, it made no mention of the specific amount. Therefore, the letter did not conform to the Miller Act's requirement that written notice "must state with substantial accuracy the amount claimed . . . ." Additionally, the Department of the Interior letter was not sent in the manner specified by the statute. The Miller Act requires timely notice, the receipt of which may be confirmed by proper service. The statute requires that notice shall be served either by means that "provides written, third-party verification of delivery to the contractor" or "in any manner in which the United States marshal of the district . . . may serve summons." Plaintiff does not suggest that the Department of the Interior utilized one of the permissible methods of service in forwarding the letter to the general contractor. In fact, plaintiff has offered no evidence showing when the Department of the Interior letter was received by L.S. Black Constructors, Inc.

Plaintiff argues that although the letter failed to meet some of the notice requirements

under the Miller Act, it came close enough to complying with those requirements to allow plaintiff to proceed with its claim. In limited cases, courts have allowed a party to proceed on a claim under the Miller Act when its attempt at giving notice, while deficient in some way, complied substantially with the statutory notice requirements. In those cases, however, the deficiencies of notice were limited to individual technical defects. E.g., United States for the Use and Benefit of Kelly-Mohrhusen v. Merle A. Patnode Co., 457 F.2d 116, 117 (7th Cir. 1972) (finding notice requirement satisfied where name of subcontractor omitted in written notice, but provided orally); United States for the Use and Benefit of Hopper Bros. Quarries v. Peerless Casualty Co., 255 F.2d 137, 144 (8th Cir. 1958) (finding notice requirement satisfied where plaintiff did not specify the amount unpaid in written notice, but provided all other relevant information in required manner). In each of those cases the sub-subcontractor was clearly attempting to provide notice that it was claiming payment of the amount it was owed from the general contractor and failed only to comply with one of the technical requirements of the Miller Act.

The deficiencies in plaintiff's attempt at giving notice are more fundamental than in the cited cases. Not only did the Department of the Interior letter fail to comply with the technical notice requirements of the Miller Act, it gave no indication that plaintiff was looking to L.S. Black Constructors, Inc. for payment, as it was required to do. Merle A. Patnode Co., 457 F.2d at 119 (notice sufficient if "there exists a writing from which . . . it

plainly appears that the nature and state of the indebtedness [were] brought home to the general contractor.") The Department of the Interior letter states that plaintiff had sent a note to Ron Erickson, presumably a government official, alleging nonpayment for its work on the St. Croix project and notifying Erickson that it intended to file a lien claim to recover the amount it was owed, but nothing in the letter suggests that plaintiff intended to file a claim against L.S. Black Constructors, Inc. In fact, the letter appears to be a response to an effort by plaintiff to file a lien claim against government property.

The letter did state that "by copy of this letter, we are advising the prime contractor and his surety of your claim." However that statement does not provide notice of plaintiff's definitive intention to file a claim against its payment bond; it states only that the Department of the Interior intended to send a copy of the letter to the general contractor to alert it to the possibility that such a claim might be forthcoming. If plaintiff actually intended to seek payment from L.S. Black Constructors, Inc., it was required to provide the notice itself, in the manner and within the time specified by statute. It failed to do so.

Although courts have given a liberal construction to the substantive portions of the Miller Act, they have adhered strictly to the statute's notice requirements in order to provide some protection to the general contractors. United States for the Use and Benefit of General Dynamics Corp. v. Home Indemnity Co., 489 F.2d 1004, 1005 (7th Cir. 1973) (noting that Miller Act is "remedial and to be liberally construed, but the giving of notice and bringing

of suit within the prescribed time is a condition precedent to the right to maintain the action."); Pepper Burns Insulation, Inc., v. Artco Corporation, 970 F.2d 1340, 1343 (4th Cir. 1992) (Miller Act notice requirement is exempted from liberal construction); United States ex rel. John D. Ahern Co. v. J. F. White Contracting Co., 649 F.2d 29, 31 (1st Cir. 1981) (Miller Act notice requirement is "mandatory and is a strict condition precedent to the existence of any right of action upon the principal contractor's bond"). As the Court of Appeals for the Ninth Circuit has observed, "the purpose of the Miller Act notice requirement is to 'fix a time limit after which the prime contractor could make payment to the subcontractor with certainty that he would not thereafter be faced by claims of those who had supplied labor and materials to the subcontractor.'" United States for the Use and Benefit of Blue Circle West, Inc. v. Tucson Mechanical Contracting Inc., 921 F.2d 911, 914 (9th Cir. 1990) (quoting Bowden v. United States ex rel. Malloy, 239 F.2d 572, 577-78 (9th Cir. 1956). With this purpose in mind, it would be unfair to allow plaintiff to proceed after it had left the general contractor without notice of its claim until after the 90-day window had closed.

Under the Miller Act, plaintiff was required to provide notice that it was looking to the general contractor for payment. Because plaintiff did not satisfy these notice requirements, I must grant defendant's motion for summary judgment.

ORDER

IT IS ORDERED that defendant Western Surety Company's motion for summary judgment is GRANTED with respect to plaintiff Viking Disposal Corporation's claim brought under 40 U.S.C. § 3133.

Entered this 1st day of August, 2007.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge